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September 25, 2019

Honorable Maritza Berdote-Byrne, P.J.Ch.
Morris County Superior Court
P.O. Box 910
Morristown, NJ 07963--0910

Re: NJDEP v. Joseph Wallace and Laura Wallace
Docket No. SSX-C-7-19

Dear Judge Berdote-Byrne:

Please accept this letter brief in support of the Department of Environmental Protection's Notice of Motion in Aid of Litigant's Rights pursuant to R. 1:10-3 in the above captioned matter. This motion is necessary because of Defendants continuing failure to take any action to comply with the Court's directions and Orders in this matter. Defendants were ordered to take a series of actions to, among other things, remove illegally placed solid waste from its residential property in Vernon Township, part of the critical environmentally sensitive preservation area of the Highlands. As a result of Defendants' non-responsiveness to this Court's Orders, and Defendants decision to ignore the Department's continued outreach efforts, the Department requests that the Court enforce



its prior Orders, impose sanctions, and appoint a receiver to make sure that the Court-ordered remedies are properly implemented.

Since this motion is to enforce orders previously consented to before, and issued by Your Honor in this same matter, the State sets forth only an abbreviated statement of the facts supplementing the Order to Show Cause previously filed in this matter.

On February 22, 2019, the State filed an Order to Show Cause with Your Honor seeking an Order holding Defendants Joseph Wallace and Laura Wallace jointly and severally liable for violations of the Solid Waste Management Act ("SWMA"), N.J.S.A. 13:1E-1 et seq., and the regulations promulgated pursuant thereto, for operating a solid waste facility without a permit, and requested the following injunctive relief from the Defendants:

a. Immediately cease receiving any and all fill material and/or solid waste onto the property at Block 130, Lot 1.05, also known as 3 Silver Spruce Drive, Vernon, New Jersey (the "site");

b. Immediately provide access by NJDEP and/or individuals on behalf of the Department to delineate the extent of the fill material and/or solid waste brought onto the site, to perform any sampling of the material on site, and/or perform any other inspections of the property as the Department deems necessary to determine compliance with the SWMA, the Water Pollution Control Act ("WPCA"), and the Highlands Water Protection and Planning Act;

c. Within thirty days of this order, characterize all fill material to determine if it meets the definition of solid waste as defined at N.J.A.C. 7:26-1.6 and provide NJDEP an estimate for the cost of removal of the solid waste;

d. Within ninety days of this order, remove and properly

dispose (in accordance with applicable New Jersey laws) of all fill material which meets the definition of solid waste on the site;

e. Within 10 days of this order, provide NJDEP with full and complete documentation setting forth the source and nature of the material brought onto the site since 2009, including but not limited to all analytical results, receipts, bills of lading, and identification of all transporting haulers;

f. Within 45 days of this order, place sufficient funds into escrow or an attorney trust account, to be identified by this Court, to guarantee adequate funds for removal of the solid waste on-site.

On March 1, 2019, oral argument was held before Your Honor to consider if temporary restraints were warranted. The parties consented to three of the above enumerated requests for relief, i.e., (a) to cease receiving all fill material, (b) to immediately provide access to NJDEP to perform its investigation, including but not limited to sampling, and (c) that within thirty days of that order [by April 1, 2019] Defendants would provide NJDEP with full and complete documentation setting forth the source and nature of the material brought onto the site since 2009. Additionally, Your Honor set a case scheduling order for briefing with a return date for a hearing on final injunctive relief for May 30, 2019. March 1, 2019 Consent Order, attached to Certification of Counsel as Exhibit A.

On March 14, 2019, Department representatives conducted additional sampling of fill material on Defendants' property, as authorized by the March 1, 2019 Consent Order. The sampling results

identified contamination levels in the soil that exceeded New Jersey's Residential Direct Contact Soil Remediation standards. The State notified the Court and Defendants of the sampling results by supplemental filing on April 8, 2019. No opposition papers were ever filed by Defendants prior to the May 30, 2019 return date and, as a result, Your Honor considered the matter exclusively on the filings submitted by the State on February 22, 2019, and April 8, 2019. On June 3, 2019, the Court granted all six of the requests for relief listed above and ordered that Defendants shall remove and properly dispose of all fill material that meets the definition of solid waste on the property within 120 days [by October 1, 2019]. See June 3, 2019 Court Order and Statement of Reasons, attached to Certification of Counsel as Exhibit C.

Thereafter, Defendants filed a Motion for Reconsideration of the June 3, 2019 Order and a Motion for Stay of Enforcement of the June 3, 2019 Order. The State opposed Defendants' application and filed a Cross Motion in Aid of Litigant's Rights to enforce Defendants' past due obligation to provide documentation on the source and nature of material brought onto Defendants' property, and followed up with a letter to the Court on August 5, 2019 detailing Defendants' further non-compliance with this Court's ordered relief (Defendants' failure to characterize the fill material, place sufficient funds into escrow, and submit and

implement a soil erosion and sediment control plan). August 5, 2019 letter, attached to Certification of Counsel as Exhibit D. In an August 22, 2019 Order, Your Honor denied Defendants' Motion and granted the State's demand for compliance with the prior June 3, 2019 Order. August 22, 2019 Court Order and Statement of Reasons, attached to Certification of Counsel as Exhibit F. Specifically, Your Honor found that "defendant willfully failed to comply with the [C]ourt's March 1, 2019 and June 3, 2019 Orders" and that "defendant is under a renewed obligation to provide NJDEP with full and complete documentation setting forth the source and nature of the material brought onto the site since 2009 without regard for documents potentially already in plaintiff's possession." Id. at 15-16 (internal quotations omitted). This Court expressly warned Defendants in the August 22, 2019 Order that, "[c]ontinued non-compliance with court Orders may result in the imposition of sanctions against defendants or the appointment of a special agent to oversee compliance with the court's Order." Id. At 2 of 16 and 16 of 16.

Following the Court's August 22, 2019 Order, the State sent two letters to counsel for Defendants, on August 23, 2019 and September 3, 2019, reminding Defendants of their obligations and requesting that Defendants advise the State how they intend to come into compliance. See August 23, 2019 letter, attached to

Certification of Counsel as Exhibit G, and September 3, 2019 letter, attached to Certification of Counsel as Exhibit H.

To date, the State has not received a response from Defendants regarding the August 22, 2019 Order or either of the State's letters. Cert. of Counsel ¶ 20.

Analysis

I. THIS COURT SHOULD GRANT THE DEPARTMENT'S MOTION IN AID OF LITIGANT'S RIGHTS TO ENFORCE THE COURT'S ORDERS.

New Jersey Rule of Court 1:10-3 authorizes a litigant to seek the Court's assistance to vindicate litigant's rights. This application is the State's second Motion in Aid of Litigant's Rights seeking compliance with the March 1, 2019 Consent Order and the June 3, 2019 Order. Your Honor has already reiterated to Defendants their continued and renewed obligation to comply with the Court's June 3, 2019 Order as well as observed Defendants' willfull non-compliance with the March 1, 2019 Consent Order and June 3, 2019 Order. Exhibit F at 15-16.

As the State has shown, Defendants were aware of their obligation to produce documentation identifying the source and nature of the fill material brought onto their property: Defendants verbally agreed on the record to do so by April 1, 2019, and the June 3, 2019 and August 22, 2019 Orders required the same production. Exhibits C and F. As the Court has previously observed, Defendants have failed to produce any documentation, except for

analytics regarding two sites not connected to their property, and receipts for a small fraction of the truckloads of materials brought on-site. May 24, 2019 letter from Counsel and attached documents, attached to Cert. of Counsel as Exhibit B.

Therefore, the State respectfully requests that Your Honor compel Defendants to comply with the March 1, 2019 Consent Order, and the June 3, 2019 and August 22, 2019 Orders to produce documentation showing the source and nature of material illegally brought on-site.

Further, on August 2, 2019, Defendants were to have characterized the illegally placed fill material to determine if it meets the definition of solid waste, submitted and implemented a soil erosion and sediment control plan for the completion of a 5G3 stormwater permit, and placed sufficient funds into escrow to guarantee funds to remove the solid waste, as ordered by the June 3, 2019 Order and reiterated in the August 22, 2019 Order. Exs. C and F. The State sent two letters to Defendants reminding them of their court-ordered obligations with no response. Exs. G and H. Defendants have failed to comply with any of their court-ordered obligations, and the State respectfully requests that the Court enforce the March 1, 2019 Consent Order, and the June 3, 2019 and August 22, 2019 Orders.

II. THE VIOLATIONS OF THE SOLID WASTE MANAGEMENT ACT SHOULD BE REMEDIED THROUGH APPOINTMENT OF A SPECIAL AGENT OR RECEIVER.

Because Defendants have repeatedly ignored the Court's orders, the State respectfully requests the appointment of a special agent or receiver, and any other appropriate relief that Your Honor deems proper and just to compel Defendants to comply with the March 1, 2019 Consent Order, and the June 3, 2019 and August 22, 2019 Orders.

The SWMA provides that relief may include "the appointment of a receiver for any violation of this act," thus there is a basis for the appointment of a statutory receiver. N.J.S.A. 13:1E-9(d). In addition to the statutory authority under SWMA, the courts of equity have the authority to appoint custodial receivers and special fiscal agents. Roach v. Margulies, 42 N.J. Super. 243 (App. Div. 1956). The appointment of a receiver is a drastic remedy which should be avoided whenever necessary relief can be achieved through less burdensome means. Kassover v. Kassover, 312 N.J. Super. 96, 100 (App. Div. 1998). A receivership or the appointment of a special agent is not an end in itself, but is only meant to reach some legitimate end sought through the exercise of the power of an equity court. In re Valley Road Sewerage Company, 295 N.J. Super. 278, 292 (App. Div. 1996). Courts have made distinctions between receivership (both custodial and statutory) and special

agents in the context of seeking compliance against corporations, holding that a special agent is a less drastic solution than a receiver, New Jersey Realty Concepts, LLC v. Mavroudis, 435 N.J. Super. 118, 125 (App. Div. 2014), but it is clear that the name of the entity charged with managing a party's assets is less important than the powers so delegated by the Court. See Ravin, Sarasohn, Cook, Baumgarten, Fisch & Rosen, P.C. v. Lowenstein Sandler, P.C., 365 N.J. Super. 241 (App. Div. 2003).¹

No court in New Jersey has articulated a definitive list of factors to consider when determining whether to appoint a receiver, and courts rarely articulate the factors they consider beyond citations to the broad powers of courts of equity qualified by the rarity of receivership. Roach v. Margulies, 42 N.J. Super. at 246 (quoting Sears, Roebuck & Co. v. Camp, 124 N.J. Eq. 403, 411 (E. & A. 1938)); Ravin, Sarasohn, Cook, Baumgarten, Fisch & Rosen, P.C. v. Lowenstein Sandler, P.C., 365 N.J. Super. at 248-50 (discussing the distinction between statutory and custodial receivership).

As a result, courts have often cited to secondary sources when looking for receivership guidance. See, e.g., Silverman v.

¹ A major distinction that courts have drawn between the categories of receivership and/or special fiscal agent is whether the agent's role is to liquidate a company or simply manage its assets, which plays less of a role in this case because Defendants are individuals, not corporations. See Ravin, Sarasohn, Cook, Baumgarten, Fisch & Rosen, P.C. v. Lowenstein Sandler, P.C., 365 N.J. Super. at 254.

Kolker, 149 N.J. Super. 162, 168 (Ch. Div. 1977) (citing C.J.S. [Corpus Juris Secundum] in the context of the powers of a receiver). C.J.S. provides that factors courts should consider include: 1) repeated failures to comply with prior court orders, 2) further efforts to secure compliance would lead to confrontation or delay, 3) leadership is available which can turn the tide within a reasonable time period, 4) existence of bad faith, 5) resources are being wasted, and 6) a receiver can provide a quick and efficient remedy. 75 C.J.S. Receivers § 35.

Defendants have engaged in continued and repeated failure to comply with and violations of court orders. Defendants failed to comply with the March 1, 2019 Consent Order, and the June 3, 2019 and August 22, 2019 Orders as they relate to production of documentation on the source and nature of fill material. As the State has shown, several of the shipping receipts provided were for material brought onto the site after the March 1, 2019 Consent Order in blantant violation of paragraph 2(a) of the Consent Order. The only purpose for bringing that material on after the Consent Order was to frustrate and impede the State's investigations and sampling of the unpermitted fill material/solid waste pile. Based upon Defendants continued importation of material onto their property contrary to court orders, extreme measures are necessary to remedy the violations.

Indeed, Your Honor has specifically held that Defendants' production of documentation related to the source and nature of fill material showed that "defendant [Joseph Wallace] willfully failed to comply with the [C]ourt's March 1, 2019 and June 3, 2019 Orders." Exhibit F, at 15. Since August 2, 2019, Defendants have failed to comply with the three other requirements of the June 3, 2019 and August 22, 2019 Court Orders as detailed above. Thus, the Court has observed that Defendants have willfully failed to comply.

Further efforts at seeking compliance short of a receiver would lead to delay, as the State is now making its second Motion in Aid of Litigant's Rights to enforce Defendants' obligations. Your Honor's conclusion regarding Defendant Joseph Wallace's willful failure to comply with court orders as well as Defendants' failure to respond to any of the State's correspondence regarding their compliance deadlines demonstrates Defendants' bad faith, to which the leadership of a receiver could provide a quick and efficient remedy by allocating Defendants' resources toward compliance, and ultimately protecting the health of the State's citizens and the environment.

To combat Defendants' willful non-compliance, the State respectfully requests that the Court appoint a receiver with the following powers:

- a) The power to identify, investigate, and marshal the

assets of Defendants to fund the following actions:

- a. the characterization of all material to determine if it meets the definition of solid waste;
 - b. to provide NJDEP with a cost estimate for the removal and proper disposal of all material identified as solid waste;
 - c. to place sufficient assets into escrow to guarantee funding for the removal of all solid waste;
 - d. to submit and implement a soil erosion and sediment control plan for the Property and apply for and obtain a 5G3 stormwater permit;
 - e. to remove and properly dispose of all material that meets the definition of solid waste from the Property.
- b) The power to access Defendants' bank accounts and any and all assets, whether real property, chattel property, or bank accounts or other funds to pay those bills, debts, and expenses that accrue by complying with all court orders on this matter.
- c) The power to require Defendants to provide an affidavit identifying all accounts in which they have an interest or signatory authority, including without limitation, all bank checking, savings, money market, brokerage,

mutual fund, stock, bond, and/or payroll accounts.

d) The power to request further powers from the Court.

Additionally, Defendants must be ordered to fully cooperate to enable the receiver to complete the tasks assigned by the Court, including providing to the receiver any and all documents (electronic or otherwise), and providing the receiver with access to the Property. Defendants must also be prohibited from transferring or concealing any and all assets.

Providing the receiver with these powers would eliminate Defendants' capacity for continued non-compliance. The receiver's leadership would blunt Defendants' bad faith and provide for the quick and efficient remediation of the environmental hazard Defendants created. Procedurally, the receiver should not be able to be sued absent leave of the Court, should provide periodic reports to the Court, and should have a finite term set by the Court which would conclude upon the removal of all solid waste from the Wallace property. Since the appointment of the receiver is entirely due to Defendants' intransigence, it is appropriate that the receiver shall be paid for by the Defendants.

In conclusion, receivership is appropriate because Defendants have repeatedly failed to comply with the Court's orders.

III. DEFENDANTS' WILLFULL REFUSAL TO COMPLY WITH MULTIPLE COURT ORDERS WARRANTS THE IMPOSITION OF SANCTIONS AND OTHER APPROPRIATE RELIEF AGAINST DEFENDANTS

Failure to comply with a court's orders qualifies as contempt of court under R. 1:10-3. A contempt finding pursuant to the court rules requires willfully contumacious behavior. A finding of willful contumacious behavior requires the court to be satisfied that the defendant is able to comply and had no good reason to resist compliance. Schochet v. Schochet, 435 N.J. Super. 542, 549-50 (App. Div. 2014). In the present matter, the court already held on August 22, 2019, that defendant "willfully failed to comply with the court's March 1, 2019 and June 3, 2019 Orders." Exhibit F, at 15. Specifically, the Court cited to Defendants' statements at the initial OTSC hearing that he had all documentation related to the material brought to site and was willing and able to turn it over. The continued silence by Defendants nearly a month after being ordered to immediately comply with all aspects of the June 3, 2019 court order also exemplifies willfully contumacious behavior. Defendants are capable of engaging an environmental consultant to conduct sampling to characterize the fill pile or reach out to NJDEP for guidance, but have chosen not to do so.

In order to guide the Court on an appropriate range for sanctions it is appropriate to look to the penalty provisions of

the SWMA and the WPCA. Both the SWMA and the WPCA have provisions which allow for imposing daily civil penalties for violations of underlying court orders issued pursuant to those statutes. "Any person who violates an administrative order issued pursuant to subsection c. of this section, or a court order issued pursuant to section d. of this section... is subject upon order of a court to a civil penalty not to exceed \$100,000.00 per day of such violations." N.J.S.A. 13:1E-9(f). Identical language for enforcement of orders under the WPCA exists at N.J.S.A. 58:10A-10(e). However, the WPCA only allows for a maximum daily penalty of \$50,000.

Although the pertinent statutes allow for penalties up to \$50,000 and \$100,000 per day, the State defers to the Court to order daily sanctions at a rate it deems appropriate. Environmental compliance is paramount, but Defendants' refusal to engage with the State or to comply with underlying Court orders requires this request for coercive relief. We request that daily sanctions would run from the date of any order resulting from this motion until representative sampling results fully characterizing the fill pile have been presented to the Department. At that point, Defendants would have sixty (60) days to remove all contaminated fill (aka solid waste) to an approved solid waste facility.

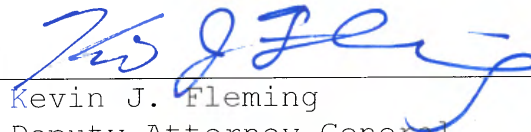
CONCLUSION

The Department therefore requests that the Court find Defendants in contempt for failure to comply with prior Court orders, order the appointment of a receiver, and appropriate sanctions to coerce compliance.

Respectfully submitted,

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